

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 3, 2010 Session

IN RE: JOSEPH D. N.

Appeal from the Juvenile Court for Robertson County
No. 09-33085 Melanie Earl Stark, Judge

No. M2009-01353-COA-R3-PT - Filed March 3, 2010

The trial court terminated the parental rights of the father of a four year old boy on the ground that he had abandoned the child by failing to visit him. The father admitted that he did not visit the child in the critical four month period prior to the filing of the petition for termination. The proof showed, however, that the mother denied or prevented visitation. The father's failure to visit his child was, therefore, not willful. We accordingly reverse the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

John B. Holt, Springfield, Tennessee, for the appellant, J.B.N.

Fletcher W. Long, Springfield, Tennessee, for the appellees, H.R.M. and J.W.B.

OPINION

The child at the center of this dispute, Joseph. N., was born on December 28, 2004. His parents, Heather M. ("Mother) and Jonathan N. ("Father") were not married, but Father signed a voluntary acknowledgment of paternity at the hospital, and his name appears on the child's birth certificate. Mother and Father were apparently living together when Joseph was born, and, even though they separated several times, Father and the child lived together during the first three years of his life.

Father and Mother lived together during the child's first year in the home of Grandmother and her husband. They also lived together for a while in the home of Mother's mother. At one point, they entered into a one-year apartment lease, and they resided there

together with the child for some period of time. Although Mother and Father had managed to reunite after separations several times, a final break between them occurred in December of 2007.

At around that same time, Mother started dating Joel B., and he eventually became her fiancé. After Mother and Father separated, they agreed between themselves that Father could exercise weekend visitation with the child from Friday to Sunday. Father's visitation continued more or less smoothly until Friday, May 30, 2008. Mother testified that on that date Father took the child to a friend's house in Nashville and called her while in a drunken state. Mother then told Father that overnight visitation was no longer appropriate and that he could not take the child for overnight visitation any more.

On a subsequent Friday, Father brought the child to Grandmother's house, and in a phone call, he told Mother that he was entitled to keep the child overnight because he was paying child support. An argument followed, and Mother called the police. They came to the house and made Father return the child. After that, Mother told Father that the only visitation she would let him exercise would be at McDonald's, and that her fiancé would have to supervise. Father did not agree to those conditions. Instead, he started calling Mother to ask her to let him see the child. Those calls quickly devolved into arguments and insults and did not lead to the results Father wanted. At some point, Father's phone calls became too frequent (Mother testified that he called her 30 times in one day; he admitted to 12). In August of 2008, Mother swore out a harassment warrant against Father, which resulted in a brief stay in jail and a condition of bail that prohibited him from having any contact with Mother, directly or indirectly.¹

On November 13, 2008, Mother and Mother's fiancé filed a petition in the Circuit Court of Robertson County for termination of Father's parental rights and for adoption of Joseph D. N. The termination petition cited three grounds for termination: abandonment by reason of failure to support, abandonment by reason of failure to visit, and the lack of a meaningful relationship between parent and child.²

¹Neither the warrant nor the order are found in the technical record. There was testimony at trial regarding the terms of bail, and counsel for Mother agreed at oral argument that the prohibition was in effect from August of 2008.

²We note that Tenn. Code Ann. § 36-1-113(g), which sets out the grounds for termination of parental rights does not include lack of a meaningful relationship among those grounds. Rather, it is one of the factors the court is directed to take into consideration when determining the best interest of the child. Tenn. Code Ann. § 36-1-113(i)(4).

By agreed order, the adoption portion of the proceeding was stayed, and the termination proceeding was transferred to the Juvenile Court of Robertson County for hearing. The termination hearing was conducted on May 13, 2009, before an attorney appointed as a special judge. Mother and Father both testified, as did Grandmother³ and Mother's fiancé.

Father testified that he loved Joseph and was determined to do his best for the child. He was very unhappy about losing out on visitation, and he recounted his last meeting with the child in June of 2008, when he was at a Wal-Mart and saw Mother with her father and the child.

The proof also showed that Father took his obligation of support seriously. When he and Mother lived together, he gave her money for the child from his earnings. After they separated, he gave money to Grandmother so she could write a check to Mother for the child's support. Father worked for an electrical contractor, but his hours fluctuated from week to week, and there were weeks when he did not pay support. Mother obtained an order for child support and garnishment of wages in October of 2008. At the time of trial, Father had lost his job with the electrical contractor and was working two jobs. He was working at Wendy's for a little more than minimum wage, and he was doing as many hours of drywall installation as the contractor he worked for made available.

Mother's fiancé testified that he had a close relationship with Joseph, that he wanted to become his father, and that he and Mother would be marrying the following Saturday. He said that he never did anything to dissuade Father from seeing Joseph, that he gave Father his cell phone number, and that Father could have called him at any time to set up visitation. He further testified that Father only called him once about the child in December 2008 as Joseph's birthday approached.

At the conclusion of testimony and of closing arguments, the trial court acknowledged that Father had furnished support to his child in the months leading up to the filing of the termination petition and also that there was no proof that Father had failed to establish a meaningful relationship with the child. The court also stated that Mother had made it difficult for Father to exercise visitation after July of 2008, but it nonetheless found by clear and convincing evidence that Father had abandoned his child by willfully failing to visit him in the four months prior to the filing of the termination petition.

³Grandmother filed a petition for grandparent visitation, which was heard on November 3, 2008. The transcript of that record was admitted as an exhibit to the termination hearing. Although Mother's attorney tried to use the earlier transcript to impeach Grandmother, her testimony was substantially the same at both hearings.

In its ruling from the bench, the court referred six times to the fact that Father had not instituted legal proceedings during the critical four month period to compel Mother to allow him to exercise his rights, stating among other things that “[Father] knows or has reason to know that he had rights he could have asserted through a wide open door known as the courthouse.” The court also briefly touched on the factors set out in Tenn. Code Ann. § 36-1-113(i) that our legislature has directed the courts to apply when determining the best interest of a child, and it declared that it found it to be in the child’s best interest for Father’s parental rights to be terminated. This appeal followed.

II. STANDARDS FOR TERMINATION OF PARENTAL RIGHTS

A parent has a fundamental right to the care, custody and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212-13 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996); *In Re Adoption of a Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995); *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994). This right is a fundamental but not absolute right, and the state may interfere with parental rights if there is a compelling state interest. *Santosky v. Kramer*, 455 U.S. 745, 747, 102 S. Ct. 1388, 1391 (1982); *Nash-Putnam*, 921 S.W.2d at 174-75.

Terminating parental rights has the legal effect of reducing the parent to the role of a complete stranger and of severing forever all legal rights and obligations of the parent and of the child; the parent shall have no right thereafter to have any relationship, legal or otherwise, with the child. Tenn. Code Ann. § 36-1-113(l)(1). The United States Supreme Court has recognized the unique nature of proceedings to terminate parental rights, stating that “[f]ew consequences of judicial action are so grave as the severance of natural family ties.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, (1996) (quoting *Santosky*, 455 U.S. at 787, (Rehnquist, J., dissenting)).

The statutes on termination of parental rights provide the only authority for a court to terminate a parent’s rights. *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004); *In re Tiffany B.*, 228 S.W.3d 148, 155 (Tenn. Ct. App. 2007). Thus, parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). To support the termination of parental rights, only one ground need be proved, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

Because the decision to terminate parental rights affects fundamental constitutional rights and carries grave consequences, courts must apply a higher standard of proof when adjudicating termination cases. A court may terminate a person’s parental rights only if (1)

the existence of at least one statutory ground is proved by clear and convincing evidence and (2) it is shown, also by clear and convincing evidence, that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d at 808-09; *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). "This heightened standard . . . serves to prevent the unwarranted termination or interference with the biological parents' rights to their children." *In re M.W.A.*, 980 S.W.2d at 622. Due to the significance of the consequences, courts must apply individualized decision-making to a termination decision. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999); *In re Tiffany B.*, 228 S.W.3d at 156.

III. ABANDONMENT

In the case before us, the trial court based the termination of Father's parental rights on a single ground: that of abandonment by reason of failure to visit. Termination of parental rights may be based upon that ground if abandonment can be proved by clear and convincing evidence, in accordance with the definition found at Tenn. Code Ann. § 36-1-102(1)(A), which defines "abandonment" as the willful failure to visit the child for a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate parental rights.

Since it is undisputed that Father did not visit his child in the four months prior to the filing of the termination petition, the question before us is whether his failure to visit was "willful" within the meaning of the statutory definition. "Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent." *In re Audrey S.*, 182 S.W.3d 838, 863 (Tenn. Ct. App. 2005). "Failure to visit or support a child is 'willful' when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so." *In re Audrey S.*, 182 S.W.3d at 864 (citing *In Re M.J.B.*, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004)). See also *Tennessee Baptist Children's Home v. Swanson*, 2 S.W.3d 180, 189 (Tenn. 1999).

Mother argues that Father could have visited Joseph at any time, so long as he acceded to her conditions: that visitation take place only at McDonald's, under the supervision of her fiancé. Father clearly found such conditions unacceptable. The trial court did not express any opinion about the appropriateness of Mother's conditions for visitation. It reasoned that if Father was dissatisfied with those conditions, he could have simply tried to obtain an order of visitation "through a wide open door known as the courthouse." It appears to us that the trial court minimized the obstacles Father faced. He was working at two jobs, neither of which paid very well, and a large proportion of his income was withheld for child support. He testified that he did not have parents or grandparents who were in a position to lend him

the money to hire an attorney. Although four months may be a long time in the life of a child, it is not necessarily so long as to cause a parent to give up all hope of being able to have his visitation restored through an avenue other than the legal system.

Mother has not cited any cases for the proposition that a parent's failure to resort to the courts for a visitation order constitutes abandonment. There are, however, numerous cases where the existence of substantial obstacles to the exercise of visitation or the payment of child support has prevented our courts from finding that a parent who has failed to overcome those obstacles in the four months prior to the filing of a termination petition has abandoned his or her child. *Means v. Ashby*, 130 S.W.3d 48 (Tenn. Ct. App. 2003); *Menard v. Meeks*, 29 S.W.3d 870 (Tenn. Ct. App. 2000); *White v. Farley*, No. E2005-00396-COA-R3-PT, 2005 WL 2604050 (Tenn. Ct. App. Oct. 14, 2005) (no Tenn. R. App. P. 11 application filed); *State of Tennessee v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726 (Tenn. Ct. App. Aug. 13, 2003) (no Tenn. R. App. P. 11 application filed).

Even more determinative of the question of willfulness, however, was the prohibition against Father directly or indirectly contacting Mother as a condition of his release from jail after Mother had him arrested. It is undisputed that this prohibition existed from sometime in August 2008. The relevant four month period under the statute was July 13 to November 13, 2008. Clearly, this limitation on Father defeats a finding of willfulness.⁴

The proof in this case showed that in order to be able to visit his child, Father would have had to either accede to Mother's onerous conditions, violate a condition of bail, or institute a court proceeding that he could not afford. Under those circumstances, we hold that the trial court erred in finding that Father had abandoned his child by willfully failing to visit. Since we cannot find clear and convincing evidence of the element of willfulness necessary for abandonment, it is unnecessary for us to determine the child's best interests based on the factors set out in T.C.A. § 36-1-113(i).

We accordingly reverse the trial court's order of termination. The record does not include any pleading by Father to establish a parenting arrangement. However, the transcript indicates that it was Father's intent to file such a pleading if the termination were dismissed. Should Father proceed with that motion, the trial court should act promptly to fashion a plan allowing both parents residential time with the child. Father and child have been denied

⁴Mother's counsel attempted to argue that the prohibition on Father contacting Mother did not hamper visitation, an argument we find unpersuasive. It is difficult to understand how Father could contact the child directly or arrange visitation that way. Mother's fiancé had no legal right to allow, deny, arrange or set conditions for visitation. Contact with either could be construed to be indirect contact with Mother.

visitation with each other for a long time, especially in view of the child's age. Consequently, the trial court should act promptly to establish a schedule establishing Father's rights to time with his child.

III.

The order of the trial court is reversed. We remand this case to the Juvenile Court of Robertson County for any further proceedings necessary. Tax the costs on appeal to the appellees.

PATRICIA J. COTTRELL, JUDGE